

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)

Decision notice

Date: 31 March 2016

Public Authority: Public Services Ombudsman for Wales
Address: 1 Ffordd yr Hen Gae
Pencoed
CF35 5LJ

Decision (including any steps ordered)

1. The complainant made a request to the Public Services Ombudsman for Wales ('PSOW') for information related to its investigation of a complaint he had previously made against Monmouthshire County Council ('the Council'). The PSOW refused the request under section 44 of the FOIA and regulation 12(5)(d) of the EIR. The Commissioner's decision is that the PSOW has correctly applied section 44 of the FOIA. The Commissioner does not require any steps to be taken.

Request and response

2. On 8 June 2015 the complainant wrote to the PSOW and requested information in the following terms:

"I wish to make an application under the freedom of information act to obtain a copy of e mails and letters between Monmouthshire County Council and your investigator, [name redacted]I (and Visa versa [sic])....The communications I require are from 20/1/15 to 30/5/15".
3. The PSOW responded on 8 July 2015 and stated that the information held relevant to the request was exempt under section 44 of the Freedom of Information Act as disclosure was prevented under section 26 of the Public Services Ombudsman (Wales) Act 2006 ('the PSOW Act').

4. On 26 July 2015 the complainant wrote to the PSOW and requested an internal review of its decision to withhold the information requested.
5. The PSOW provided the outcome of its internal review on 9 September 2015. The PSOW explained that actually, section 26 of the PSOW Act had been repealed by the Social Services and Well-being (Wales) Act 2014. As such the PSOW considered that disclosure of the information requested was prevented under section 34X of the PSOW Act, and therefore exempt under section 44 of the FOIA. The PSOW also confirmed that some of the information held relevant to the request was environmental information. The PSOW stated that it considered regulation 12(5)(d) of the EIR to apply to the environmental information held relevant to the request.

Scope of the case

6. The complainant contacted the Commissioner on 6 October 2015 to complain about the PSOW's refusal to disclose the information requested.
7. In his complaint to the Commissioner the complainant explained that the information he had requested was "for our eyes only & not for public disclosure". The Commissioner advised the complainant that the FOIA and EIR were public disclosure regimes. As such, information released by a public authority in response to a request under the FOIA or the EIR is considered to be in the public domain. The Commissioner confirmed that he would be unable to consider whether the information requested should be disclosed only to the complainant, but rather whether it should be placed in the public domain. The Commissioner also confirmed that he did not have any remit to investigate any issues concerned with the Council's decision to grant the planning permission in question.
8. Having inspected the withheld information the Commissioner notes that some of it constitutes the complainant's own personal data. This information consists of two letters the Council had sent to the complainant, copies of which were provided to the PSOW for the purposes of its investigation. During the course of the Commissioner's investigation, the complainant confirmed that he was not interested in any letters which the Council had previously sent to him. The letters in question have therefore been scoped out of the Commissioner's investigation.

Reasons for decision

Correct access regime

9. The withheld information in this case comprises emails sent by the PSOW to the Council regarding the complaint, and email responses from the Council. Some emails from the Council to the PSOW included attachments which comprise copies of letters that the Council had sent to the complainant.
10. The PSOW considered the request under both the FOIA and the EIR. Although the subject of the complainant's complaint to the PSOW generally relates to a planning application and the Council's compliance with policies and procedures, the PSOW does not consider that all of the withheld information constitutes environmental information. The PSOW's position is that the only environmental information held relevant to the request is a copy of a letter the Council sent to the complainant dated 14 April 2015, which the Council provided to the PSOW during its investigation.
11. Having reviewed the withheld information the Commissioner accepts that the majority of the information is not environmental as it focuses on the administrative mechanisms attached to the complaint, rather than on the planning and development of the land in question. However, he notes that the letter that the Council sent to the complainant dated 14 April 2015 refers specifically to a non-material amendment planning application. The Commissioner is satisfied that this information falls within the definition at regulation 2(1)(c) because it is information on, or relating to, a measure (planning and development) which is designed to protect the elements referred to in regulation 2(1)(a); namely land and landscape.
12. However, as stated in paragraph 8 above, the complainant has confirmed that he is not interested in any letters which the Council had previously sent to him. The Commissioner has therefore excluded this information from his investigation. In light of this, the Commissioner considers that the remaining withheld information falls to be considered under the FOIA. He has therefore gone on to consider the PSOW's application of section 44 of the FOIA.

Section 44 – prohibitions on disclosure

13. Section 44(1)(a) provides an exemption from disclosure under the FOIA for information which is prohibited from disclosure under other legislation. In effect, the inclusion of the exemption by the authors of FOIA was designed to protect against the inadvertent release of information that a legislative body had already decided should be kept

confidential. A critical point is that section 44 of the FOIA is an absolute exemption, which means that unlike a number of other exemptions in the FOIA it is not subject to the public interest test.

14. The PSOW explained that the legislation it considers prohibits disclosure under section 44 of the FOIA is section 34X of the PSOW Act. The PSOW Act was amended by the Social Services and Well-being (Wales) Act 2014, including repealing section 25 of the PSOW Act and replacing it with section 34X.
15. Section 34X of the PSOW Act sets out the restrictions on disclosure of information, and states that information obtained by the Ombudsman in the discharge of his or her functions in deciding whether to begin an investigation, in the course of an investigation, or in resolving a complaint must not be disclosed, unless certain exceptions apply.
16. The withheld information comprises emails sent to the Council by the PSOW and emails from the Council to the PSOW. The withheld information therefore includes information generated by the PSOW itself. It is the Commissioner's view that where such information draws upon, or makes reference to the complaint against the Council or the PSOW's investigation into such complaints then this constitutes information obtained by the PSOW.
17. The Commissioner has considered the withheld information in this case and is satisfied that the non-environmental information was obtained by the PSOW in connection deciding whether to begin an investigation.
18. Section 34X(2) of the PSOW Act sets out exceptions or gateways where the non-disclosure clause provisions would not apply. A disclosure in line with the FOIA is not amongst the situations listed therefore none of these exceptions would apply.
19. In view of the above, the Commissioner is satisfied that section 34(X) of the PSOW Act prohibits the disclosure of the non-environmental information and has therefore concluded that section 44(1)(a) of the FOIA is engaged. As section 44 is an absolute exemption there is no need to consider the public interest test.

Right of appeal

20. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

21. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
22. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF